

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 GALVESTON DIVISION

4 HARMON ET AL. § CASE NO. 3:20-cv-00021
5 VERSUS § HOUSTON, TX
6 SHELL OIL COMPANY § THURSDAY,
§ MARCH 9, 2023
§ 9:00 AM TO 10:20 AM

7 CLASS CERTIFICATION HEARING

8 BEFORE THE HONORABLE ANDREW M. EDISON
9 UNITED STATES MAGISTRATE JUDGE

10 APPEARANCES:

11 FOR THE PARTIES: SEE NEXT PAGE

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1 GALVESTON, TEXAS; THURSDAY, MARCH 9, 2023; 9:00 AM

2 THE COURT: Okay, good morning, everyone. This is
3 the United States District Court for the Southern District of
4 Texas. I'm Judge Andrew Edison presiding. We're here today on
5 Case 3:20-cv-21, Charles Harmon, et al. versus Shell Oil
6 Company, et al. Can I get into introduction of counsel for the
7 record starting with the plaintiff?

8 MR. WOLFF: Good morning, Your Honor. It's Michael
9 Wolff for the plaintiffs. And with me is Sean Soyars, who will
10 be arguing the motion this morning.

11 THE COURT: Good to see both of you. And for the
12 defendants?

13 MR. LENNON: Good morning, Your Honor, Mike Lennon
14 here on behalf of the defendants. I'm joined by my colleague,
15 Ankur Mandhania and Ann Stephens from Shell is also here with
16 us.

17 THE COURT: Good to see all of you. Okay. We're
18 obviously here on the plaintiffs' motion for class
19 certification, Docket Entry 159. And I think Fifth Circuit law
20 basically requires me to give everyone the opportunity to have
21 an evidentiary hearing and anything else they want to. I
22 issued an order to have you all give me witness lists and
23 exhibit binders by a certain date. And using the incredible
24 deduction powers, since I didn't get a witness list or any
25 exhibits, my assumption is that the parties are both agreeable

1 that the record is complete on summary judgment -- not summary
2 judgment. Summary judgment is separate -- on class
3 certification. And really we can resort to argument. Is that
4 a fair summary from the plaintiffs' side?

5 MR. MANDHANIA: Yes, Your Honor.

6 THE COURT: And from the defendants?

7 MR. LENNON: Yes, Your Honor.

8 THE COURT: Okay. With that said, here's the way I'd
9 like to proceed. I have a bunch of questions asked and so let
10 me address my questions to both sides and then I promise at the
11 end, I'll take a break, talk to my brain trust, and then give
12 you all an opportunity to add anything else you would like to
13 add to address the issues.

14 So here's the way I see this. Class certification,
15 there's really two main arguments that the defendants advance
16 for class certification not to be granted. The first is
17 standing, which I separate both in the standing of the named
18 plaintiffs and the absent class members. And then separately,
19 or aside from that, there's a typicality argument that there's
20 interclass conflicts. Is that fair from the defense side?

21 MR. SOYARS: Yes, Your Honor. I think you're right
22 that those are the two main arguments that we've presented.
23 And I think there's some -- as to the sort of first question
24 is, can any class here be certified, I think you've identified
25 the two arguments we have.

1 THE COURT: Okay. So, well, let's start with
2 standard, right? Because obviously standing, the Fifth Circuit
3 has said is an inherent prerequisite to the class certification
4 inquiry. Once again, I just want to go through sort of how I
5 see this and have you-all tell me if you disagree or I'm wrong.
6 And I want to go plaintiff, named plaintiff by named plaintiff.
7 So if we start with Lawrence, there's no challenge to Lawrence
8 in the initial opposition at all to standing. The only
9 standing challenge comes into play in the supplemental
10 authority submission that was made in February. And as I
11 understand, the defendants' argument is as follows: Lawrence
12 invested in some Tier III funds, but he didn't invest in every
13 single Tier III fund. So he only has standing to bring a Tier
14 III claim on behalf of those funds that he actively
15 participated or actively invested in. Fair?

16 MR. MANDHANIA: I think that's right, Your Honor,
17 with one caveat, which is, I think you're approaching this
18 question the right way, which is going, you know, what is the
19 claim and who has standing for that claim? And as I was
20 rereading the plaintiffs' class certification papers here, I
21 think their argument is about a single breach with respect to
22 Tier III, that the decision to, I think as they put it, retain
23 Tier III on the plan is the decision of which they complain.
24 And if that's the claim we're talking about, then I think
25 defendants' position is, you know, there are interclass

1 conflict issues, but we have no objection to Mr. Lawrence's
2 standing. I think it gets a little -- where it would differ
3 and where we would have a standing argument is if plaintiffs
4 are alleging that each individual fund in Tier III comprises an
5 independent breach, and if, you know, I don't think that issue
6 is before you because I don't think that's the way their motion
7 was brought. But if that were their claim, as some of their
8 other papers in the case has suggested, then you've identified
9 what our standing objection would be, which is Mr. Lawrence
10 would have standing only for the claim that the funds that he
11 invested in.

12 THE COURT: Well maybe this is going to be an easy
13 hearing because my understanding, help me out on the
14 plaintiffs' side, my understanding is your argument is the
15 process claim. You are not challenging necessarily each
16 individual fund. Is that accurate?

17 MR. SOYARS: I believe that's accurate, Your Honor.
18 I think some of the experts have talked about on the merits,
19 that some of the funds provide examples of why retaining that
20 entire tier was imprudent. But the overall claim is
21 challenging the decision to retain Tier III as a whole.

22 THE COURT: Okay. So if that's the case, on the
23 plaintiffs' side, we have no, there's no opposition, there's
24 really no discussion, no opposition to Lawrence as a, as a
25 class representative?

1 MR. MANDHANIA: On standing grounds. That's right,
2 Your Honor. I'm caveating the other objections. But yes.

3 THE COURT: Absolutely. And to be clear, I wasn't
4 trying to, I'm just focusing right now on the standing issue.
5 So based on the representations we've had here, the defendants
6 have no opposition on standing grounds to Lawrence?

7 MR. MANDHANIA: As to the Tier III claim. I will
8 just point out, Your Honor, while we're talking about Mr.
9 Lawrence, that I'm not sure the plaintiffs have put forward
10 evidence regarding whether any of the Tier III funds he
11 invested in actually paid recordkeeping. And if so, what those
12 periods were when Mr. Lawrence paid recordkeeping. So, you
13 know, for purposes of this discussion, if we assume that there
14 were at least some periods where Mr. Lawrence paid
15 recordkeeping, then Shell's position would be he had standing
16 as to those periods. That some subset of the class, you know,
17 the six years plus that's encompassed by the class. And I can,
18 you know, perhaps plaintiffs are better positioned to tell us
19 exactly what subset that is. But that's not, there's at least
20 there's -- but if we assume that at least one of the funds Mr.
21 Lawrence invested in actually paid for recordkeeping in Tier
22 III, then I think we agree that he has standing as to the
23 recordkeeping claims for that period of time.

24 THE COURT: Okay. Hold on. Does the defendants have
25 an injection to standing on Mr. Lawrence on any claim?

1 MR. MANDHANIA: Yes. Sure, Your Honor.

2 THE COURT: On standing?

3 MR. MANDHANIA: Yes, Your Honor.

4 THE COURT: Which claim?

5 MR. MANDHANIA: The recordkeeping claim, Your Honor.

6 MR. SOYARS: Well why wasn't it in the brief?

7 THE COURT: Hold on, hold on. Mr. Soyars, you're
8 taking my role for a second. And there's nowhere in the
9 briefing that Shell has provided in this case, right?

10 MR. MANDHANIA: I believe that's correct, Your Honor.

11 THE COURT: Okay. So Shell's position originally was
12 Lawrence doesn't have standing -- Lawrence, there's no
13 opposition standing. The first time the argument is made in
14 the supplemental grade which indicates, hey, there's a standing
15 issue on the Tier III claim, Count 2. But now as I understand
16 it, Shell does not have an opposition to standing on the Tier
17 III claim, but now for the first time, Shell is claiming that
18 there's no standing for Lawrence on a recordkeeping claim?

19 MR. MANDHANIA: The only thing that would have been
20 slightly there, Your Honor, is our objection to Mr. Lawrence's
21 standing, or I guess the standing problem that Mr. Lawrence has
22 with respect to the recordkeeping claim, isn't a, you know, he
23 has no standing to bring any sort of recordkeeping claim type
24 of argument. It's really a question of what are the time
25 periods where he paid those fees and thus would have standing?

1 And if he --

2 THE COURT: Okay, let me, let me make sure I
3 understand. Until December 2020, as I appreciate it,
4 recordkeeping fees were assessed against funds in Tier III.
5 Starting in January 2021, the allegation at least, is that
6 Shell began charging \$60 annual fee to everyone, right?

7 MR. MANDHANIA: That is their allegation, Your Honor.
8 The one thing I would just point out is I think the parties are
9 in agreement that in that, you know, pre-December 2020 period,
10 there were some Tier III funds that paid recordkeeping, but not
11 all Tier III funds paid recordkeeping on behalf of the Shell
12 plan. So merely telling us that someone was invested in Tier
13 III doesn't tell us that that person paid recordkeeping. You
14 have to look and see whether the particular funds they invested
15 in were those which paid recordkeeping fees.

16 THE COURT: Okay. I'm curious in a second to hear a
17 response to Mr. Soyars, but I got to be honest with you, if
18 this is such a great argument, why is it not in a single paper
19 in this case until the oral hearing now?

20 MR. MANDHANIA: It's a fair question, Your Honor. I
21 and, you know, I definitely understand your frustration that
22 this is the first time, you know, this issue is being brought
23 to life. All I can say is that I was reviewing the papers, you
24 know, pretty late last night in preparation to this argument.
25 I noticed, hang on a second, the only evidence we have about

1 what these plaintiffs were invested in were in Shell's expert's
2 declaration. We identified the funds that one of the main
3 plaintiffs was in for recordkeeping, but we didn't do it for
4 Lawrence. Where's that evidence? How is the Court going to
5 know that it has Article III jurisdiction over Lawrence's
6 claim? I had that question late last night and I haven't yet
7 found the answer to that, which is why I thought it was
8 incumbent upon me to raise the issue before the Court
9 proceeded.

10 THE COURT: Okay, Mr. Soyars, your turn.

11 MR. SOYARS: Okay. The premise that there's no
12 evidence of what Mr. Lawrence invested in is incorrect because
13 he discusses it in his deposition, which is attached as one of
14 the first three exhibits to the motion. And then they have a -
15 - the defendant hired an expert at the rate of \$730 an hour to
16 analyze these funds in Tier III. And he points out in
17 Paragraph 8.173.2 that he had reviewed, reviewed every fund in
18 the tier and identify those that do not have revenue sharing.
19 And he said that was the case for Mr. Coble that he didn't
20 invest in any of those revenue sharing funds, but he didn't say
21 anything about Mr. Lawrence. I think we can assume that at the
22 rate of \$730 an hour, he looked at that and would have said
23 something about it if, if there were any question as to Mr.
24 Lawrence as well.

25 THE COURT: It sounds like you have a firm belief

1 that Mr. Lawrence invested in Tier III funds and the
2 recordkeeping fees were assessed, right?

3 THE COURT: It that's true, there's no question
4 Lawrence has standing, right.

5 MR. SOYARS: That is true.

6 THE COURT: Okay. Right?

7 MR. SOYARS: Correct. And Coble invested --

8 THE COURT: I'm just focused on Lawrence.

9 MR. SOYARS: Okay. Just Lawrence, that's right.

10 THE COURT: So why don't we just, just do this to
11 cover, just to cover the tracks so there's no uncertainty, why
12 don't the plaintiffs just supplement the record was something
13 clear as day that indicates that Lawrence, that Lawrence had
14 Tier III buns in which recordkeeping these were set sometime
15 during the class period?

16 MR. SOYARS: That shouldn't be problem.

17 THE COURT: If plaintiff does that, the defense has
18 no objection to Lawrence as class representative on standing
19 grounds alone?

20 MR. MANDHANIA: I think, I think we would say -- well,
21 let me just say what we would say, Your Honor. He would then
22 have standing for the time period where he paid the fee. And
23 we'll know what that period is at the time that he --

24 THE COURT: Time out. I got to stop there. That
25 surely is not the law, right? I mean, your position cannot be,

1 can it, can you say with a straight face that a class
2 representative has -- let's say it's a 10-year class period,
3 that the class, that the plaintiff has to be invested in all 10
4 years? And if the only, if the plaintiff has only invested 9.5
5 of those years, they then have no standing to bring a claim on
6 behalf of the class? Is that really --

7 MR. MANDHANIA: I think if we were talking about like
8 a securities class action or something like that, Your Honor, I
9 don't think we would be making this argument. But the
10 plaintiffs' position is that this fund was, as I understand the
11 recordkeeping claim, and I'm no recordkeeping expert, I think
12 their claim is that this scheme was unreasonable in 2014. It
13 was unreasonable based on the market dynamics in 2015, '16,
14 '17, et cetera. And so the evidence that you look at for each
15 of those years is different. It's what was the prevailing
16 market rates that year? The way that you would assess what,
17 you know, there were minor changes being made to what the fee
18 was during this period. The prohibited transaction claim
19 refers to, you know how Shell allocated the money that was
20 rebated from this recordkeeping. And there were some
21 transactions in some years that might have been kosher, other
22 transactions in other years. So I don't know why someone who
23 paid recordkeeping, let's say just in 2018, would have standing
24 as to an allegedly improper transaction that occurred two years
25 before that person ever paid those fees. So that's why. I

1 think because of the nature of this claim, there's,
2 unfortunately, I do think that's the way the article treaty
3 analysis has to happen.

4 THE COURT: Okay, I feel like I've just been thrown a
5 huge softball up here by the plaintiffs. Mr. Soyars, I'll let
6 you respond.

7 MR. SOYARS: Yeah, I mean the plaintiffs are going to
8 object to them, just coming up with these new standing
9 arguments on the fly that were never briefed. And we put a lot
10 of time and effort into these papers and I don't think there's
11 any legal support for the theory that he's trying to come up
12 with here.

13 THE COURT: Okay. Let me ask you this. If Lawrence
14 has standing, why does it matter about Coble and Harmon just
15 from a practical standpoint from the plaintiffs' side?

16 MR. SOYARS: It doesn't. I mean that's our argument.
17 As long as long as one main plaintiff has standing, that's the
18 end of the inquiry for Article III purposes.

19 THE COURT: I guess here's what I mean. Well each
20 named claimant has to have standing, right? Meaning I could
21 have a case where Lawrence is the class rep and he has standing
22 and I'm the class rep when I don't have standing. So my
23 question is if I find that Lawrence has standing, do I even
24 need to think or contemplate or concern myself with Harmon or
25 Coble?

1 MR. SOYARS: For purposes of subject matter
2 jurisdiction, you do not, Your Honor. But then the question
3 is, what do we do with Coble and Harmon? And I think the
4 defendants have asked that they be stricken from the case and
5 we object to that. As we pointed out, standing requires an
6 identifiable trifle. And even if they didn't invest in Tier
7 III, the presence of Tier III caused higher fees in the Tier I
8 and II funds in which they did invest. And it's in the record
9 now that there was over \$6 million of planned losses due to
10 that fee differential. And that's certainly an identifiable
11 trifle. So they have, they have standing.

12 THE COURT: Okay. Well, let me ask you this. If we
13 look at, if we move over to Coble and Harmon for a second. At
14 least from the briefing, I'm not sure there's new argument that
15 Shell wants to make now, but at least from the briefing, there
16 is no question that Coble has standing for Count 1, Count 3 and
17 Count 8, correct? Let me rephrase that. I'm going to have to
18 divide this into two questions. There is no argument in any
19 briefing that Shell has provided in this case that challenges
20 standing for Coble on Count 1, Count 3 and Count 8, right?

21 MR. MANDHANIA: I apologize, Your Honor. I'm used to
22 thinking about this in terms of the substance of the claim. So
23 I'm just trying to make sure I mapped back to this into the
24 account of the, of the complaint before I answer your question.
25 I, I sincerely apologize.

1 THE COURT: Count 1 is record keeping.

2 MR. MANDHANIA: Right.

3 THE COURT: By the way, I'm with you. Count 2 is
4 Tier III, which causes me internal problems. But Count 1 is
5 recordkeeping. Count 3 is financial engines and Count 8 is
6 administrative expenses. At least that's the way I consider
7 it.

8 MR. MANDHANIA: Right. And so to answer your
9 question, Your Honor, we have no objection or we haven't made
10 any arguments about the financial engine issue in our papers
11 other than to point out that I believe it's Mr. Harmon never
12 used the service. As to Mr. Coble --

13 THE COURT: I'm not talking about Harmon. I have
14 talked about this. One by one. Coble, is there an objection
15 to Coble on the unreasonable recordkeeping claim as far as
16 standing is concerned?

17 MR. MANDHANIA: No, Your Honor.

18 THE COURT: Okay. With respect to Count 3, the
19 financial engines, is there any objection in the briefing to --
20 I mean I think I know the answer to this. The answer is no,
21 but I just sort of want to verify. Right?

22 MR. MANDHANIA: Correct, Your Honor.

23 THE COURT: So is it fair to say the only objection
24 to Coble as a class rep is on Count 2, which is the Tier III
25 claim because Shell's argument is he did not invest in Tier III

1 funds.

2 MR. MANDHANIA: No, Your Honor. It is true that we
3 have an objection to Mr. Coble's standing on that claim, but
4 our objection is that he invested in Tier III funds, which made
5 money. So he can't show a loss since he was successful in
6 that.

7 THE COURT: My fault on that. You're correct. Okay.
8 And so -- well, let me hear from Mr. Soyars on that issue.

9 MR. SOYARS: Mr. Coble, he does have losses from Tier
10 III. The defendants are trying to use the damages calculation
11 to show that he doesn't have standing, which is, is improper
12 because we have a competing damages calculation that uses
13 different benchmarks and shows that he did lose money and that
14 the plan lost over \$600 million. So resolving that merit issue
15 isn't an Article III, appropriate inquiry for Article III
16 standing.

17 THE COURT: Why isn't that true on the defense side?
18 I mean, like, like basically I understand your argument, oh,
19 Coble made money. And the plaintiffs argument he lost money.
20 Am I supposed to decide that merits-related issue at the class
21 certification stage?

22 MR. MANDHANIA: Well, I think, of course not, Your
23 Honor, but I do think you have to ask yourself, what's the
24 evidence in the class certification record that's been
25 presented to you? The expert reports were all issued after

1 class certification or after we completed the class
2 certification briefing. And as you pointed out early,
3 plaintiffs just declined to put that expert reports they're now
4 referencing into the class certification record. So they're
5 telling you they don't need that evidence in order to certify
6 the class. The only people who put any actual evidence before
7 the Court on how you calculate loss for anyone is Shell.

8 We put the declaration of our expert in with our
9 opposition brief and that declaration calculates loss based on
10 the benchmarks of the funds, and says, hey, there's no loss
11 there. I understand the plaintiff may not like that approach
12 to calculating damages, but then they should have either put in
13 an expert declaration with their reply and we would have, you
14 know, fought the Daubert fight there or they should have taken
15 your invitation to supplement the record last week when you
16 gave that to them. So all they have really are the allegations
17 in the complaint. And the Fifth Circuit has told us that at
18 the class certification stage, a district court cannot just
19 accept the allegations in a complaint as true and say, well, if
20 these allegations are true, can the class be certified? The
21 Chavez decision in 2020 was exactly that saying much more is
22 required. And if plaintiffs chose not to put that much more
23 before you, I mean, that was kind of their decision.

24 THE COURT: Well, that's a question I ask
25 (indiscernible). I mean, look, if the plaintiffs can

1 supplement the record with an iota of evidence that he, that
2 Lawrence invested in Tier III funds in which the recording fees
3 were assessed, I think it's absolutely clear and obvious that
4 Lawrence had standing and therefore, even if one plaintiff,
5 he's the named representative and at least there's no standing
6 issue when we talk about others conflicts. And I'm just sort
7 of curious why at the end it really matters about Harmon and
8 Coble whether they are named plaintiffs or not in this case, or
9 at least for the time being? Because it seems like we just, we
10 have to sort of go down this, I don't know, sort of down this
11 legal analysis on each claim and whether there's -- whether
12 they have standing on each claim and I'm not really sure that's
13 important at this time. Mr. Soyars, any thoughts?

14 MR. SOYARS: Well, I mean, we agree with you, you
15 know, getting into Coble and Harmon standing at this point
16 really doesn't serve any purpose. We would just object to the
17 extent the defendants have requested that he be stricken from
18 the case. And as far as submitting evidence of Coble's damages
19 calculations, we pointed this out in the brief. It's true that
20 that Rule 23 compliance has to be proven by evidence. But
21 under the standing approach at class certs, this is the
22 Deepwater Horizon 2014 opinion, this approach does not
23 contemplate scrutinizing or weighing any evidence of class
24 members standing during the Rule 23 stage. So that, that's why
25 we didn't put it in and it wasn't necessary under Fifth Circuit

1 law.

2 I guess, you know, one consideration is it
3 strengthens the representation of the class to have multiple
4 representatives in case for some reason, you know, there were
5 any issues with Mr. Lawrence. And, you know, for the reasons
6 we pointed out, Coble and Harmon do -- have demonstrated harm.

7 THE COURT: Let me ask this. Simple appearance would
8 say there's no objection of standing for Coble on Count 1,
9 Count 3 and Count 8, named as class representative on those,
10 simply at least in argument on Count 2, the Tier III. We'll
11 hold him off as a class rep on that claim for now. What's
12 wrong with that? Isn't that simple? At that end, how would
13 you-all be negatively impacted by that? Maybe I'm overthinking
14 it.

15 MR. SOYARS: Well, again, Your Honor, the inquiry for
16 Coble standing, he has, he has Count 2 standing, meaning Tier
17 III. If he alleges an injury and they're trying to get into a
18 merits calculation, that does not negate his standing
19 whatsoever. So he has standing.

20 THE COURT: Okay, let me switch gears, Harmon. We
21 have no doubt that he does not have standing on Count 3, the
22 financial injuries. And he was not part of Tier III, right?

23 MR. SOYARS: He did not invest in Tier III, but he,
24 again, was impacted by the fee elevation of the other tiers due
25 to Tier III's credit.

1 THE COURT: Okay. And with respect to Count 1, the
2 unreasonable recordkeeping and Count 8, the administrative
3 expense, he would not have been harmed, at least up until
4 3/2020, because the recordkeeping fees, as I mentioned, I think
5 the allegation is they were set against funds in Tier III and
6 since he wasn't in Tier III, that didn't happen to him. But as
7 of January 2021, when Shell started charging the \$60 annual fee
8 to everyone, and plaintiffs' argument, as I appreciate it, is
9 that fee was excessive. At least for the time period of
10 January '21 moving forward, is there any doubt from the
11 defendants side that Mr. Harmon has standing?

12 MR. MANDHANIA: No, Your Honor. I just want to point
13 out that there is a factual dispute about whether that was a
14 \$60 fee. I wouldn't want the Court to, you know, misconstrue
15 that in its order. But on the Article III question, I mean
16 whatever the fee he paid was, he paid it as of January 1st,
17 2021. And so he has standing to assert that that fee is
18 unreasonable.

19 THE COURT: Okay, let's talk about absent class
20 members for a second. From the briefing, defendants argument
21 is that class cannot be certified if it contains member lacking
22 Article III standards. I'm curious, hasn't the Fifth Circuit
23 already decided this? I mean it seems to me in Mims versus
24 Stewart Title, which both sides reference, the Fifth Circuit
25 clearly adopted the Seventh Circuit's Kohen Test that says we

1 focus exclusively on the standing of named plaintiffs and
2 ignore absent class members entirely. Why doesn't that Fifth
3 Circuit precedent, whether I like it or not, why doesn't that
4 control?

5 MR. MANDHANIA: Well, respectfully, Your Honor, I
6 mean, the Fifth Circuit said in its 2020 opinion *Flecha v.*
7 *Medicredit*, that this was an open question. The panel that
8 heard arguments in *Chavez* yesterday was asking a lot of
9 questions about the standing of uninjured class members and
10 whether the district court's certification order could be
11 sustained, given the presence of large numbers of a major class
12 members. So I frankly think it would come as a surprise to the
13 Fifth Circuit to find that it actually had resolved this issue,
14 you know, many years prior.

15 In any event, I actually think this is a little bit
16 of an academic dispute. I actually don't think anything hinges
17 on figuring out whether *Mims* is the standard here. And here's
18 why. I mean what the court said it means is that the class as
19 defined was sufficiently narrow as to exclude the likelihood
20 that many plaintiffs were improperly included. So in other
21 words, what *Mims* says is that if you defined the class in a way
22 such that, you know, that people in the class suffered Article
23 III injury, the fact that there might be one or two outliers
24 isn't going to defeat class certification. And that's
25 consistent with what courts adopting *Shell's* approach have said

1 that, you know, of course. Look, if it's a 35,000 class
2 members or 35,000 member class and there's like two people who
3 lack Article III standing there from some strange fact, it's
4 not our position that there's no certifiable class there. I
5 mean, if you really had to, you could define the class in a way
6 that excluded that de minimis number of uninjured people.

7 The problem here is the same. It is that the
8 plaintiffs can't even satisfy that Mims test. They can't
9 define the class in a way that excludes the likelihood of many
10 improperly included plaintiffs. So I think the plaintiffs are
11 wrong about whether the Fifth Circuit has taken a position
12 here. But I also don't think the Court really needs to weight
13 into that issue in order to deny the class certification
14 motion.

15 THE COURT: And it's Shell position that there could
16 be any -- so I guess you're arguing you cannot define the class
17 in any way to limit it to those folks who unquestionably have
18 standing?

19 MR. MANDHANIA: Well, you certainly can't do it the
20 way the plaintiffs have, which is an omnibus class for these
21 three claims of everyone who was in the plan from I think it's
22 January 21, 2014 to the present. I mean, there's just -- that
23 class definition definitely doesn't work and that's the class
24 definition that we've been using, you know, to litigate this
25 case to date. And I think an 11th hour change there to a

1 wildly different definition would be somewhat prejudicial, at
2 least without the opportunity to supplement the record with
3 respect to plaintiffs new theory.

4 But I mean setting that issue aside ignoring, you
5 know, just could you fashion the definition here? I don't
6 really see how you could while satisfying the rest of Rule 23
7 dictates.

8 THE COURT: Mr. Soyars.

9 MR. SOYARS: Well, they still have no answer for the
10 fact that every class member was injured because the tier, the
11 presence of Tier III drove up funds, the cost of the funds in
12 Tier I and Tier II. So no matter where a participant chose to
13 invest, they were harmed by this, the actions here and they
14 have Article III standing. Although you correctly point out,
15 Your Honor, the Mims approach of looking at the class member,
16 class representative standing is, is all that's required at
17 this stage.

18 THE COURT: Well I guess the question becomes with
19 respect -- and I got to focus claim by claim. So I'm just
20 focusing on Count 2, the Tier III claim, the way the class is
21 defined or proposed by the plaintiffs, it would cover all those
22 invested in Tier III. Is it your argument that all those that
23 invested in Tier III, even if it happened to be they invested
24 in the fund, you know, bet entirely on the Kansas City Chiefs
25 and the (indiscernible), in other words, assuming they made

1 money in their Tier III funds, how are they injured?

2 MR. SOYARS: Well the remedy in this case, it's not
3 an individual damages award. It's recovering the losses to the
4 plan. And the only way to do that is to, is to have everyone
5 in the plan. And this is how these classes, we've been
6 appointed in 34 of these and they've all been defined this way
7 to include all the participants in the plan. So the question
8 for standing purposes really, were they exposed to the
9 defendants' misconduct? And they were because they invested in
10 Tier III. If they ultimately made money, that's a question of
11 damages on the merits. It's not a question of standing.
12 Otherwise you'd have to certify a class, you have to, you have
13 to have the trial first, calculate the damages, and then do a
14 calculation for 30,000 - 50,000 people to decide if you can
15 certify class. It doesn't make any sense. And that's not how
16 any court has done it.

17 THE COURT: And, in fact, on the Shell side, in the
18 reply brief, the plaintiffs mentioned the Supreme Court case
19 from I think it was 2016, Tyson Foods versus Bouaphakeo. I
20 mispronounced that and I apologize up front. But as I
21 understand in that case, what happened is that it went to a
22 jury verdict. There were a number of plaintiffs who I guess
23 under the damage calculations were not injured. And the
24 Supreme Court allowed that case to proceed as a class action
25 and just said we'd remedy that later on, going back to the

1 trial court. Why isn't that dispositive on this issue?

2 MR. MANDHANIA: I think that, well, what the court
3 had before it in Tyson, and in other cases were similar
4 approaches have been used, is a model that actually was offered
5 at the class certification stage, I believe, that allowed you
6 to identify who was and wasn't injured and make sure that the
7 people who were uninjured, you know, were a de minimis amount
8 is the language that some of the cases used here, and I must
9 admit I chuckled a little bit at counsel's suggestion that no
10 court does it this way, given my, you know, in an antitrust
11 case, it's entirely common to have a rigorous expert, you know,
12 statistical model at the certification stage who tells you
13 here's the number of people who are injured, here's the average
14 price premium vacate, and so on and so forth. I mean I just
15 think it's, you know, the question is, can we be certain that
16 the number of people in the class who did not suffer injury,
17 you know, is a trivial or de minimis amount? And I just don't
18 know how the Court can be comfortable of that conclusion given
19 the limited record and you know, the facts of the case.

20 THE COURT: Help me out on the plaintiffs' side.
21 People who invested in Tier III are injured how?

22 MR. SOYARS: People who invested in Tier III? There
23 was an imprudent option with retaining the plan with no sort of
24 monitoring done by the defendants. And the expert reports have
25 demonstrated that the plan lost over \$600 million because those

1 funds were retained. So they would have made more money in
2 their individual accounts if that option had been eliminated at
3 the start of the class period.

4 THE COURT: I guess Shell's response, argument or
5 response is, is it true maybe certain took a loss, but certain
6 people might have gained, right? It all depends on what fund
7 they invested in. In other words, there might be -- I'm just
8 taking a pure hypothetical out of thin air -- there might be
9 some, you know, really highly spectacular fund that the
10 plaintiffs in effect are arguing, hey, it was imprudent to have
11 that fund in there. But lo and behold, it went way up. Those
12 individuals would have lost nothing. In fact, those
13 individuals would have gained from the imprudent operation
14 while others would have lost. Right?

15 MR. MANDHANIA: Yes, Your Honor. I think that's what
16 --

17 THE COURT: Hold on. That's more directed to the
18 plaintiffs. I'm sorry.

19 MR. MANDHANIA: Oh, I apologize, Your Honor.

20 THE COURT: You both, you both thought I was going
21 the opposite way.

22 MR. SOYARS: Yeah, it's possible they ultimately made
23 money. But that is the question of damages on the merits and
24 not Article III standard.

25 THE COURT: But your view is as long as the

1 allegation is made in the complaint that they've been damaged,
2 then that suffices for Article III standing and that we should
3 sort of later on figure out whether each individual plaintiff
4 lost or gained?

5 MR. SOYARS: Essentially with the clarification that
6 it's not even necessarily to decide if individuals lost or
7 gained, because the monetary award is ultimately to the plan
8 itself and then the money will be distributed by a plan
9 trustee. So the statute, any losses to the plan resulting from
10 the breach of fiduciary duty. So essentially, if the plan lost
11 money that, that makes a prima facie case, then would sustain
12 an award to the plan itself. And then the way that money is
13 divided up would take into account whether individuals lost or
14 gained.

15 THE COURT: But this case is brought on behalf of the
16 plan -- is brought on behalf of the individuals. That's the
17 class you asked me to certify is those individuals who invested
18 into it or at least with respect to that count.

19 MR. SOYARS: Well, no, it's brought on behalf of the
20 plan. That's the cause of action under 1130(2)(a)(2). We
21 pointed this out in the first argument section of our opening
22 brief that this is an inherently representative claim brought
23 on behalf of a retirement plan itself. And because of that
24 representative nature, is the reason why the courts have found
25 these cases to be paradigmatic, classic examples of claims that

1 should be certified as a class action.

2 THE COURT: Okay, let me switch gears for a second.
3 The argument, I don't think there's any question that, I don't
4 think I'm wrong on this -- there's no question in terms of
5 numerosity, commonality and adequacy. The question defendants
6 focus on is typicality and perspective intraclass conflicts,
7 right?

8 MR. MANDHANIA: That's right, Your Honor.

9 THE COURT: Help me out. What is the conflict? I'm,
10 in all candor, I'm confused.

11 MR. MANDHANIA: Sure. Which claim would you like me
12 to focus on first?

13 THE COURT: The reason I'm pausing, I'm curious to
14 see how this is going to be different. Let's start with
15 (indiscernible).

16 MR. MANDHANIA: Sure. So post 2021, I don't think
17 we're, you know, we're not bringing an argument about any
18 conflict because if everyone pays the same fees, either that
19 fee is reasonable or it wasn't. Fair enough. Pre that, you
20 had a system where some people were paying all of the
21 recordkeeping and administrative fee while other people paid
22 nothing. And there's an obvious conflict there where some
23 folks essentially got to free ride on those who paid the higher
24 allegedly imprudent fee. I mean I think the way the
25 plaintiffs' counsel put it in some of the depositions was,

1 isn't this an unfair system that benefited some people and
2 harmed others? And so that's, that's the essential conflict
3 there. It's pretty similar, actually, to the conflict
4 presented in the Prudhomme v. Geico case that the Fifth Circuit
5 decided last year where the challenge was to the way that Geico
6 figured out the value of a vehicle that had been totaled. And
7 the allegation was that Geico was using the wrong formula,
8 violated Louisiana law, et cetera. Fifth Circuit said, well,
9 hang on. The evidence is that some people actually got more
10 money for their totaled vehicle thanks to Geico's formula than
11 they would have had Geico complied with state law. That's --
12 those people are in conflict with the folks who got less money
13 under the Geico formula than they would have under Louisiana
14 formula. That's exactly the kind of conflict we're talking
15 about here where some people got to obtain recordkeeping and
16 administrative services and paid nothing. Other people paid
17 for those services on behalf of the entire plan.

18 THE COURT: Okay. I guess two questions. I'll go
19 read the Geico case. I don't think that's cited anywhere in
20 the briefing either, is it?

21 MR. MANDHANIA: I think it came out after the
22 briefing was concluded, Your Honor. So we apologize for not
23 filing a notice of supplemental authority on it.

24 THE COURT: Let me ask you this. I understand, I
25 mean in effect, the plaintiffs' argument is that the folks in

1 Tier III had to shoulder an unfair burden and that the folks
2 who weren't invested in Tier III basically got the, got a
3 benefit. They didn't have to pay the fees that they should
4 have had. But at the end of the day, what's the conflict?
5 Meaning the relief that the plaintiff is requesting in this
6 case is that the plan reimburse or basically pay those Tier III
7 folks for, in their view, the unnecessary recordkeeping fees,
8 and administrative expenses that they incurred. There's no
9 impact to the Tier I -- or not Tier I -- the folks who do not
10 invest in Tier III at all. Right? It's not as if they're
11 negatively impacted. So that's what I mean. I guess to put it
12 another way. In the reply brief, defendants say Shell has
13 already eliminated Tier III and the practices of charging all
14 fees to Tier III investors. Thus, the relief sought: recovery
15 from Shell of excessive fees paid, cannot possibly harm any
16 class members. I'm guessing (indiscernible).

17 MR. MANDHANIA: And I do think -- and this is why I
18 brought up the Prudhomme case, Your Honor. Because, you know,
19 it wasn't like Geico was going to go back and take money out of
20 the hands of the folks who got more under its formula than they
21 would have received under Louisiana law. Right? I mean, the
22 question, the question the Fifth Circuit concerned itself with,
23 and I think the question for the Court here is, if Shell had
24 done what the plaintiffs now say it should have done, there are
25 people who would benefit from that, right? The folks who paid,

1 who paid for recordkeeping from their Tier III investments
2 would be better off if Shell had, for example, a flat per
3 participant fee that everyone paid. But the folks like Mr.
4 Harmon who didn't invest in Tier III, would have been worse off
5 under that regime. He would have had to pay that fee of
6 however much it was or would have been in that world. And so
7 the theory being advanced is adverse to his interest even if,
8 you know, no one is suggesting that Shell is going to surcharge
9 their accounts and take that money back or anything like that.

10 THE COURT: Okay.

11 MR. MANDHANIA: And I'm happy to provide the Westlaw
12 cite for that case if that would be helpful to the Court or
13 their clerks. It's up to you.

14 THE COURT: I already got it. It's already on my
15 screen. Modern technology works in amazing, amazing ways.
16 Okay. One of the questions for the plaintiffs, in your reply
17 brief, you propose or should suggest some alternative
18 modifications to the class definitions which you suggest would
19 cure. And I understand you totally disagree with Shell and
20 think their arguments are bogus, but you make the comment, hey,
21 here's some proposals that would cure the alleged problems with
22 the class definition. And I guess I'm questioning, how do, how
23 do those revised definitions solve the alleged problems? And I
24 fully understand you totally disagree with them.

25 MR. SOYARS: Yeah, if I could just pull that part up.

1 So --

2 THE COURT: I've actually put on my screen.

3 MR. SOYARS: Okay.

4 THE COURT: As I understand it, these are your
5 proposed, would be the -- right now there are, in effect, two
6 subclasses and the third subclass, there's no argument.

7 MR. SOYARS: Right.

8 MR. MANDHANIA: I mean, that's conceded by Shell
9 that's a proper subclass. And I just, to sort of help me think
10 through this, I've just taken, you had one class in your
11 suggestions, which just so you're clear, stopped at 188 -- Page
12 19 or Page 14 of the brief, Page 19 of 22 on what's on the ECF.
13 You say although Shell's conflict standing arguments are
14 meritless, any issue could probably be cured through a modified
15 definition. And then as I understand it, these are your
16 modified definitions. Just in all candor, I'm sort of curious
17 how these, how these cure those issues? Well let me say this -
18 - well, go ahead, go ahead.

19 MR. SOYARS: Well, I'll start with Number 3, the
20 managed account. That's, that's not altered and that's not
21 been opposed.

22 THE COURT: Correct.

23 MR. SOYARS: So on one and two, I think it, it
24 eliminates the problem, for Number 1, it's a Tier III issue.
25 The defendant's argument that people didn't, who didn't invest

1 in Tier III that makes that class overbroad. So that would
2 eliminate those individuals and would negate that argument.
3 And now on Tier II, it would eliminate people who the defendant
4 claims have a conflict because they didn't actually pay any
5 part of the recordkeeping fees, that they weren't in the
6 revenue sharing funds. So that eliminates that conflict. And
7 I would just also point out that the defendant suggested that
8 it would be prejudicial somehow to modify the class at this
9 point. But that's what they suggested in their opposition
10 brief on Page 10, Doc 171. They cite the Avila case pointing
11 out that a court sua sponte redefined at a class that was found
12 to be overbroad and that's also supported by Fifth Circuit
13 precedent including a case called Monumental Life Insurance
14 Company, In Re Monumental Life, 365 F.3d 408 at 414. District
15 courts are permitted to limit or modifying class definition to
16 provide the necessary precision.

17 So I think those refinements, we don't, we don't
18 agree they're necessary. And there is a downside in that the
19 people who are excluded could then file another case. They
20 could say that Shell shouldn't have removed Tier III and should
21 have stuck with it, which would then cause the sorts of
22 problems that Rule 23(b)(1) is designed to prevent. So it's
23 not without some risk, but that would certainly, I think,
24 answer the argument that Shell made.

25 THE COURT: Okay. Okay, let me do this. This has

1 been very helpful for me. Let me take a quick break, talk to
2 my brain trust, and then come back with any additional
3 questions I have. And if I don't have any other questions, as
4 I say, I will give each side a full and fair opportunity to
5 address whatever issues that I might have failed to address.

6 So with that, let me do this, let me go off the
7 record and we'll be back in a second.

8 (Recess)

9 THE COURT: Okay, I am back. So I got one thought.
10 And then -- well let me see. Let me see if there's any, I
11 don't have any questions right now. But is there anything
12 else, I know we've gone through this a lot, but any other
13 issues that either side would like to address and I believe
14 since it is plaintiffs' motion, I should give plaintiffs the
15 opportunity to go first.

16 MR. SOYARS: Nothing else at this time, Your Honor.
17 Thank you.

18 THE COURT: Okay. And behalf of the defendants,
19 anything else you want to chime in on?

20 MR. MANDHANIA: There was one issue that was
21 discussed during the first half of the argument, Your Honor,
22 that I just like to make a couple comments about which was sort
23 of the Article III issue and the way that plays with loss to
24 the plan and that language in the ERISA statute. I just want
25 to remind the Court that the Supreme Court did say in Thole

1 that there's no ERISA exemption to Article III. And the
2 question is really whether these plaintiffs have suffered an
3 injury, in fact, of the kind that Article III contemplates.
4 Only once that showing is made do we get into the contours of,
5 you know, what would that relief look like and issues of that
6 kind.

7 And to sort of bring that home, I was thinking about,
8 you know, given the arguments that Shell has made, what should
9 plaintiffs have done if they wanted to certify this class? And
10 what is the kind of evidence that we're saying they needed?
11 And on Article III, I think what we're saying they needed is a
12 plaintiff who lost money by investing in Tier III, coupled with
13 evidence that the plan, as a whole, suffered loss due to the
14 inclusion of Tier III. And because there's -- and if they put
15 that expert evidence in the class certification stage, so we
16 had an opportunity to rebut that evidence, we would explain to
17 the Court that actually the plan was better off with the
18 inclusion of Tier III. And you would have the record needed to
19 come to a full conclusion on that issue.

20 THE COURT: Say that again? You're saying that you
21 think in order to prove (indiscernible), it had to have named
22 plaintiff who they could show lost money by their investments
23 in Tier III and that the plan as a whole lost money?

24 MR. MANDHANIA: No, Your Honor. I apologize if I
25 misspoke. The latter half is what they would need to overcome

1 our, or at least blunt the weight of our arguments regarding
2 interclass conflict. I mean if they had an expert who had put
3 his opinion in the records backed by relevant and reliable
4 methodology, who could say, you know, here's the amount of
5 money that was lost, Shell would have an opportunity to
6 question the way those calculations were made. You would have
7 a full record and you have the evidence that you would need to
8 figure out, okay, what happened here?

9 And just the point I wanted to make is, you know,
10 Shell's arguments should not be misconstrued as saying that no
11 claim can be certified. That's obviously not our position.
12 And that's not, we know that that's not what the law is. Our
13 objection is really to this claim based on these facts and, in
14 particular, on this record.

15 MR. SOYARS: May I respond?

16 THE COURT: Sure. Mr. Soyars?

17 MR. SOYARS: Yeah, the point about (indiscernible) is
18 a straw man. We're not arguing that the plan's loss eliminates
19 the need for the main plaintiffs to show their own loss. But
20 they haven't contested Mr. Lawrence's standing and that, that's
21 really dispositive here. And these, these arguments about what
22 kind of evidence should have been put in, these are again new
23 arguments that were never made in their briefs and they should
24 have made them before. That's all I have. Thank you.

25 MR. MANDHANIA: I was not planning to respond further

1 unless the Court had questions.

2 THE COURT: I'm thinking here. Based on the argument
3 that Shell now makes, and this is the first time we've ever
4 heard it, right, in oral argument, there is no standing
5 argument on Lawrence until today.

6 MR. MANDHANIA: I want to be careful here, Your
7 Honor. I did not intend by my comments to suggest that
8 Lawrence lacks Article III standing with respect to his
9 investments in Tier III. I'm not trying to raise that issue.
10 We discussed it at some length in the opening.

11 We do have a problem with, you know, the standing of
12 people like plaintiff, like Mr. Coble. And we think that the
13 lack of injury for the people who either didn't invest in Tier
14 III or invested and made money is going to be a reason
15 ultimately that the Tier III class can't be certified. But
16 that's a, that's an issue regarding the Rule 23 prerequisite,
17 that's not an argument with respect to Mr. Lawrence's Article
18 III standing on that claim.

19 THE COURT: But that is a standing argument. It's a
20 Lawrence standing issue. It's an unnamed class standing issue.

21 MR. MANDHANIA: That's right. I mean our contention
22 is that there are large swaths of the class who were not
23 injured and, in fact, were benefited by the inclusion of Tier
24 III. And that given the best situation here --

25 THE COURT: Where is that argument? This is the

1 first time I've ever heard that argument, at least I think.
2 Maybe I'm mistaken. Where is that argument?

3 MR. MANDHANIA: That argument is in our brief -- I
4 think this is the argument that is made in the section of our
5 brief that begins on ECF Page 15, Page 10, brief Page 10 about
6 the intraclass conflicts that prevents the certification of the
7 class.

8 THE COURT: Hang on for one second. I apologize. I
9 don't want you to leave before I make sure I get all my
10 questions answered. Okay. I think the briefing speaks for
11 itself. It says what it says. I'll look at that. Anything
12 else from defendants or the plaintiffs?

13 MR. MANDHANIA: Nothing further for the defendants,
14 Your Honor.

15 MR. SOYARS: Nothing further, Your Honor, from the
16 plaintiffs.

17 THE COURT: Okay. Well thank you both very much. I
18 really appreciate it. Excellent briefing by everyone. And
19 obviously I'm going to take this under advisement. There's a
20 couple of things I want to look at.

21 I guess two other things real quick. One, Mr.
22 Soyars, I mentioned earlier that I'd give you-all a chance just
23 to make sure there's no issue here since I don't think there
24 will be. But, you know, to have you supplement the record to
25 indicate whether Lawrence invested in Tier III funds to which

1 recordkeeping fees were assessed. I know Shell raised that
2 argument here today for the first time. So I'll give you an
3 opportunity to do that. How much time do you need?

4 MR. SOYARS: Five minutes probably. We can file it
5 today, I would think.

6 THE COURT: Okay. That's too late, no. I'll tell
7 you what, I feel generous. I'm going to give you until Friday,
8 at the end of the day Friday to file. And then I guess the
9 only other thing I'd asked on Shell side if -- and obviously, I
10 got to take a look at it. I'm curious. At the end of the day,
11 if I think the class should be certified and I had to pick
12 between the proposed class and sort of the modified definitions
13 I put up there before -- and I totally understand Shell
14 vehemently opposed class certification for all the reasons you
15 eloquently stated. But if I had to choose between one of
16 those, which should I choose?

17 MR. MANDHANIA: I'll start by noting, I'm going to
18 order a, I'm going to frame a page of the transcript in which
19 you refer to me as eloquent, Your Honor. But setting that
20 aside for the moment --

21 THE COURT: Show it to your parents, show it to, you
22 know, everyone at the firm.

23 MR. MANDHANIA: Yes, Your Honor. I think we would,
24 if forced to choose between the unpalatable alternatives, we'll
25 pick the narrower class. I think there is going to be some

1 issues with how that class has tried, but there are probably
2 fewer issues than with the thought class.

3 THE COURT: And then the other thing, let me throw
4 out there a couple things. Mr. Soyars, Mr. Mandhanian had
5 mentioned the Geico case from the Fifth Circuit, which I took a
6 look at it over the break, 2022 WL 5101713021, 2022. And he
7 gave some arguments as to why he thought that applied. If for
8 any reason, you know, I don't want to, I'm going to give you a
9 chance, obviously you haven't read it, I assume, since he just
10 mentioned the case. But if there's any response to retort to
11 that case that you want, not that you're required to do so, I
12 invite you to submit a letter on that by the end of the day
13 tomorrow as well.

14 MR. SOYARS: Okay. Yeah, we took a quick peek at it
15 and just notice it's a non-precedential opinion. So there
16 wasn't much detail explaining the basis, but I will take a look
17 at it.

18 THE COURT: I just glanced as well, but I think it's
19 only fair if a case is raised, at least you get the opportunity
20 to, if you want, to say. So with all that said, once again, I
21 really appreciate it. I'm going to take it under advisement,
22 get to it. I know I have some other issues in front of me
23 which we are working hard on. And you should have orders on
24 all those in short course. So we're plugging through and I
25 really appreciate it. Have a great day, great rest of the week

1 and we're on -- we're off the record. Thanks so much. Take
2 care.

3 MR. MANDHANIA: Thank you, Your Honor.

4 MR. SOYARS: Thank you, Your Honor.

5 (Hearing adjourned at 10:20 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

A handwritten signature in cursive script that reads "Sonya M. Ledanski Hyde". The signature is written in dark ink and is positioned above the printed name.

Sonya Ledanski Hyde

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Date: March 17, 2023